IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 319 OF 1983

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI

and

MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes.

2. To be referred to the Reporter or not? No. @r
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3. Whether Their Lordships wish to see the fair copy of the judgement? No.

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No.

5. Whether it is to be circulated to the Civil Judge? No.

In ITR No.319/83.

COMMISSIONER OF INCOME TAX, GUJARAT, CENTRAL,

AHMEDABAD.

Vs.

M/S GARDEN SILK WEAVING FACTORY, SURAT

Appearance:

In ITR No.319/83

MR BHARAT J SHELAT instructed by
MR MANISH R BHATT, Advocate, for applicant.
MR J P SHAH, Advocate, for respondent.

CORAM : MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE R.BALIA.

Date of decision: 24/01/97

ORAL JUDGEMENT (Per R. Balia, J)

In pursuance of directions issued by this Court in ITR No.140/82 decided on 21-10-1992 on an application u/s 256 (2) at the instance of the revenue following two questions of law arising out of the order of the Tribunal in ITA No.1927/Ahd/70 for assessment year 1969-70 deleting penalty levied u/s 271 (1) (c) of the Income Tax Act read with Explanation thereto, have been referred along with statement of case.

"1. Whether on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal has been right in law in deleting the penalty imposed by the IAC u/s 271 (1) (c) of the I.T. Act, 1961 and explanation thereto ?

2. Whether the finding of the Appellate Tribunal in deleting the Penalty imposed u/s 271 (1) (c) of the I.T. Act, 1961 is sustainable in law on the basis of the material on record ?

2. Brief facts relevant for the present controversy may be noticed. During the course of assessment year 1969-70 two additions were made in the assessable income of the assessee. An amount of Rs.67,500/- was added by deeming it to be income of the assessee on the ground that explanation furnished by the assessee about source of amounts paid for receiving delivery of documents for import of Nylon yarn from Germany was not found satisfactory when he was called upon to do so; and another addition of Rs.80,000/- was made when his

explanation about cash found in his possession was not accepted as satisfactory, with reference to the provisions of Sec.69A of the I.T. Act, 1961. The additions in income were sustained by the Tribunal.

3. During the course of assessment proceeding for levy of penalty u/s 271 (1) (c) were initiated in respect of the aforesaid two additions, and penalty was imposed by Income-tax Officer after rejecting the explanation furnished by the assessee by invoking presumption under Explanation to clause (c) of Section 271 (1) of the Act.

4. It is to be noticed that the findings recorded during the course of assessment proceedings though is relevant pieces of evidence while adjudicating the penalty proceedings, the same are not conclusive and it is permissible under the penalty proceedings to arrive at a conclusion different from one that has been arrived at during the course of assessment of tax. Prior to insertion of Explanation w.e.f. 1-4-1968 burden was always on the department to establish that the alleged addition in respect of which penalty is sought to be imposed is in fact the income of the assessee of the previous year which he failed to disclose.

5. However, since the insertion of Explanation, the position is altered about burden of proof where the Explanation becomes applicable.

6. For above purpose of clause (c), read with Explanation as it stood at the relevant time, when the returned income of the person is less than 80% of the assessed income he is deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income. However, penalty proceeding does not end with raising of this presumption. It has only incorporated rule of evidence to absolve the assessing authority of the burden of initial proof that the amount added in the course of assessment represents the assessee's income of the previous year which was not disclosed by the assessee and it is for the assessee to explain the source and nature of such additions for which the assessing authority is required to adjudicate upon. It is open for the assessing authority to decide as to whether the assessee failed to disclose his income or failed to furnish the particulars of his income accurately or there was no fraud or gross or wilful neglect on the part of the assessee to furnish inaccurate particulars of such income. In that event benefit of presumption will not be available to the revenue and the assessee can also persuade the revenue authorities that

the explanation furnished by him about the fact that the amount added during the course of assessment did not represent his income and and satisfy the assessing authority on that score also.

7. In the case of Chuharmal Vs. Commissioner of Income-Tax, reported in ITR 172 SC 251, the Supreme Court held that where the income returned is less than 80% of income assessed, deemed income comprising value of unexplained articles added as undisclosed income can form basis for imposing penalty. However, the Court further stated that when the conditions of the Explanation are satisfied the Explanation applies and it can be said that the revenue has discharged its onus of proving concealed income and onus of proof rests on the assessee to prove otherwise. In the facts and circumstances of that case, the Court found that in the said case the assessee has failed to discharge his onus of proof. The decision indicates that Explanation embodies a rule of evidence giving rise to a rebuttable presumption in favour of revenue.

8. In the case of C.I.T. Vs. Baroda Tin Works, reported in 22I ITR 661, this Court has held that where the total income returned by the assessee is less than 80 per cent of the total income as assessed, the Explanation to Section 27(1)(c) of the Income Tax Act, 1961 shifts the burden to the assessee to show that the difference was not owing to fraud or gross or wilful neglect on his part. This onus is rebuttable. If, in an appropriate case, the Tribunal or the fact-finding body is satisfied on relevant and cogent material on record and draws an inference thereupon that the assessee was not guilty of gross or wilful neglect or fraud, then in such a case, the assessee cannot come within the mischief of the section and suffer penalty merely on the basis of addition. Whether in a given case, the assessee has discharged his burden is a conclusion of fact and not a question of law.

9. In the case of Commissioner of Income-Tax, Gujarat-III Vs. Vinaychand Harilal, reported in 120 ITR 753, the Court held that, normally, the revenue must establish that the receipt of the amount in question constitute the income of the assessee. The Explanation to S.271(1)(c) of the Act enables the revenue to discharge this burden of proof laid on it if the condition regarding the returned income being less than 80 per cent, of the assessed income is satisfied. But the presumption can be rebutted by the assessee. The Court further held that in order to rebut the presumption

raised by the explanation to Sec.271(1)(c) it is open to the assessee to point to the record of the case which would enable him to show that he had not concealed the particulars of his income or furnished inaccurate particulars of his income. It is not necessary that any positive material should be produced by the assessee in order to discharge this burden which rests upon him. The assessee may claim to have discharged the burden by relying on the material which is on record in penalty proceedings, irrespective of whether it is produced by him or by the revenue. It further held that the presumption raised in favour of the assessee stands rebutted or not is primarily a question of fact and not a question of law.

10. The position of law was clearly stated by the Supreme Court thus in CIT Vs. Mussadilal Rambharose, (1987) 165, ITR 14.

> "The position, therefore, in law is clear. If the returned income is less than 80% of the assessed income, the presumption is raised against the assessee that the assessee is guilty of fraud or gross or wilful neglect as a result of which he has concealed the income but this presumption can be rebutted. The rebuttal must be on materials relevant and cogent. It is for the fact-finding body to judge the relevancy and sufficiency of the materials. If such a fact-finding body, bearing the aforesaid principles in mind, comes to the conclusion that the assessee has discharged the onus, it becomes a conclusion of fact. No question of law arises."

11. Keeping in view the aforesaid principle, if we examine the order of the Tribunal, we find that after detailed discussion on the material on record the Tribunal reached the finding that on question of addition itself there is not sufficient evidence to connect the goods received by way of ownership or otherwise with the assessee. It also found that at any rate the assessee's connection with this has not been satisfactorily explained and take it that ownership of the goods has not been successfully fastened on to the assessee, and that there is also no evidence of payment for the goods. Likewise about addition of Rs.80,000/- the Tribunal held that probability that monies taken out through the Tijori Account could find its way to the assessee's own branch in Bombay cannot be ruled out. It finally reached conclusion that the question of addition itself is on

doubtful ground as regards the entire addition the assessee's explanation being plausible cannot be ruled out.

12. We think, in view of these findings of the Tribunal, that the explanation furnished by the assessee to be plausible which is a finding of fact the presumption raised in favour of the revenue under explanation to Section 271(1)(c) stood rebutted and the Tribunal was justified in setting aside the penalty.

13. As a result of the aforesaid discussion, we answer both the questions referred to us in the affirmative i.e. in favour of the assessee and against the revenue. This reference, accordingly, stands disposed of, with no order as to costs.

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